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Inducing Breach of Contract, Conversion and Contract as Property

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Abstract

This article seeks to understand contractual rights through an examination of the possible 'property' content in contracts in the context of the inducement tort and conversion. It argues that, contrary to popular perception, contracts and property are different shades of a similar phenomenon. Not being a reified 'thing' with stable features and structure, property is a relative rather than an absolute concept. To determine whether the holder of an intangible resource ought to be conferred with 'property' or exclusive control of access to such resource, one has to evaluate the relevant practical, legal and moral considerations. Applied to the context of inducing breach of contract and conversion, this analysis demonstrates that a contractual right is in fact a composite collection of distinct interests and each tort may be protective of one or more of such interests. Thus, liability is imposed for inducing breach of contract because tort law recognizes the promisee's exclusive right to the peremptory status of the promisor's promise. On the other hand, the wrongfulness of converting a contract lies in the usurpation of a contracting party's control, or the exclusive entitlement to decide whether and how to exercise her rights under the contract.

1. Introduction

The decision of the House of Lords in *OBG Ltd v Allan*[1] is likely to be the subject of lively debate for a long time to come. In a move applauded by commentators[2] for giving structure and clarity to the hitherto confounding topic of economic torts, their Lordships drew a bright line between the classic tort of inducing a breach of contract and the tort of causing loss by unlawful means, emphasizing the distinct rationales underlying the two torts. By a narrow majority, their Lordships also adhered to orthodoxy in confining the tort of conversion to chattels, refusing to extend its application to intangibles such as contractual rights.[3] The examination of these two torts raises an important question: to what extent and on what basis ought the law of tort to be invoked to protect contractual interests? A satisfactory answer can only be found, it is submitted, in first elucidating the nature of contractual interests.

Of the diverse observations raised in their Lordship's reasoning, the conception of contractual rights as some form of 'property' stands out in both the context of inducing breach of contract and of conversion. Specifically, Lord Hoffmann explained[4] the rationale of the *Lumley v Gye*[5] tort as follows:

It treats contractual rights as *a species of property* which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so.

Notwithstanding this appeal to property in justifying the inducement tort, a majority of the Law Lords were not moved by the same idea to extend conversion liability to contractual interests. In this latter

context, Lord Hoffmann was anxious to distinguish contracts from chattels, emphasizing the traditional role of the tort in safeguarding (only) the latter. Instead, contractual loss is characterized as 'pure economic loss'.[6] The dissenting Law Lords, on the other hand, questioned the rationality of the distinction between chattels and contracts for the purposes of the tort when it is well-established that the tort applies to documentary intangibles. Baroness Hale, in particular, pointed to the 'proprietary' quality that inheres in both documentary choses in action and general contractual interests, and the indefensibility of applying the tort to one but not the other.[7] What thus emerges from this debate is the endorsement of some limited conception of contracts as 'property' by both the majority and minority Law Lords, but it is far from clear whether they had in mind a common understanding of contract as property. In light of that, what, if any, is the analytical value of property analogies in these contexts? Or are they mere rhetoric purporting to legitimize pre-determined conclusions? From this perspective, the tort issues that arose in *OBG v Allan* are not just about torts, but are also about contracts. The various contentious tort issues serve, in fact, as an external lens through which a different perspective of the nature and function of contracts may be obtained. And, because tort law has traditionally assumed the important role of protecting persons and property, analogies with property appear both pertinent and unavoidable.

This article seeks, therefore, to extract fresh perspectives on contractual rights through an examination of the possible 'property' content in contracts in the context of the inducement tort and conversion. It takes the view that, contrary to common perception, contracts and property are better seen as different shades of a similar phenomenon. In particular, property does not exist as a reified 'thing' with stable features and structure; it is a relative rather than an absolute concept. At its core, property may be understood as a state-endorsed power relation that regulates access to valuable resources. To qualify for such protection, a resource must minimally be capable of being excluded from the rest of the world. The question whether intangibles are amenable to such exclusivity has to be determined by evaluating the relevant practical, legal and moral considerations. Applied to the context of inducing breach of contract and conversion, this produces an interesting result. That is, tort does not relate to contract as if it were a monolith. Instead, a contractual right is better seen as a composite collection of distinct interests and each tort may be protective of one or more of such interests. Thus, liability is imposed for inducing breach of contract because tort law recognizes the promisee's exclusive right to the peremptory status of the promisor's promise. The rationale of the tort thus rests essentially on a moral basis. On the other hand, if the conversion of contractual rights is permitted (and it is argued that it ought to be), then the critical interest is the exclusive control which a contracting party may legitimately expect to exercise over his contractual rights. The justification for such extension stems from the desirability of respecting a contracting party's exclusive entitlement to decide whether and how to exercise her rights under the contract.

2. Contract as Property

At common law, contract and property are usually conceived of as being diametrically opposed. If property is 'represented by a continuum along which varying kinds of "property" status may shade finely into each other',[8] contractual rights are thought to lie at the far end of nil 'propertiness'.[9] A classic example of such an approach is found in the well-known dichotomy drawn by Wesley Hohfeld between rights *in rem* and rights *in personam*. According to Hohfeld, rights *in rem* are 'multital rights' that are good against persons of a large and indefinite class, while rights *in personam* are 'paucital rights' that apply against one or several determinate persons.[10] Since a bilateral contract embodies obligations owed to determinate persons, it is the quintessential example of an *in personam* right. Notably, while Hohfeld does *not* insist on any intrinsic difference between *in rem* and *in personam* rights, the distinction is premised entirely on the *scope* of the respective rights.[11] In other words, rights *in rem* and rights *in personam* are fundamentally of the same nature, differing only in the class of persons to whom they attach. This conception is crucial to a central tenet of Hohfeld's thesis, that is, all rights *in rem* apply to *persons, not things*, specifically tangible things.[12] Because both *in rem* and *in personam* rights apply to persons, it is not possible, in Hohfeld's view, to distinguish between their intrinsic characters. For the same reason, it also follows that rights *in rem* do not always relate to tangible objects.[13] Other than

tangible objects, rights *in rem* could exist even in intellectual property, bodily integrity, reputation and even privacy. The decisive factor is whether the right is of a nature that could be applied as against a wide and indefinite class of persons. So understood, Hohfeld's approach creates only a 'weak' distinction between property and contractual rights. Even though he cites the bilateral contract as the paradigm of *in personam* rights by way of contrast to *in rem* rights, the distinction breaks down once it is possible to conceive of the contractual right, or particular aspects of it, as being good against a broad and unlimited class of persons. The tort of inducing breach of contract appears to achieve this result by protecting a promisee's expectations from the interference of strangers, thus inspiring justificatory accounts premised on analogies between contract and property rights.[14]

Hohfeld's exposition of property rights is also known to have precipitated the modern conception of property as a 'bundle of rights'.[15] This stems from his contention that land, the archetype of 'property', is in fact 'a complex aggregate of rights (or claims), privileges, powers and immunities'.[16] This means that property is not defined by a single legal relation, but a multiple of such relations with multiple persons and each of such relations exists independently of the others. Similarly, the bundle metaphor depicts property as a collection of distinct and independent legal relations.[17] Being separable, the constituent relations of each bundle may be taken apart and recombined to constitute different bundles. No one bundle, however, constitutes the definitive mark of 'property' or 'ownership'. So 'property' comprises not a singular coherent concept but a varying content contingent on the legal incidents that make up a particular bundle. But while the bundle metaphor frees the property notion from the constraints of traditional forms of property, it provides scant guidance for distinguishing property from other rights.[18]

One way to fill this gap is found in Tony Honoré's standard incidents of ownership. In his seminal article, Honoré identifies these standard incidents as 'the right to possess, the right to use, the right to manage, the right to income of the thing, the right to capital, the right to security [against expropriation], the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability execution, and the incident of residuarity'.[19] For Honoré, these incidents constitute the 'necessary ingredients' of a liberal concept of ownership in a particular legal system, but a person may be designated as the 'owner' of a thing even if some of such incidents are absent.[20] Applying these criteria, contractual rights may still be understood as property in a weak sense.[21] A contractual chose in action, for example, may be transmitted, alienated and transferred by way of sale or security and may in that sense be used, managed and exploited for profit. It may also be stolen for purposes of criminal offences.[22] So while Honoré's account identifies those incidents by which property rights are commonly recognized, it does not isolate any incident, or set of incidents, as the necessary or definitive features of ownership. Like Hohfeld, Honoré does not conceive of ownership as an absolute concept.

An approach that stands in stark contrast to those of Hohfeld's and Honoré's is found in the works of James Penner. According to Penner, the analyses of Hohfeld and Honoré fail to produce a workable distinction between property and contract rights because both approaches view property as a set of relations between persons with no reference to the 'thing'—the subject matter of the property right. Perceiving this to be the fundamental flaw of modern jurisprudence on property, Penner argues that the significance of property as a legal norm can only be preserved by reverting to the understanding of property as a 'right to a thing'.[23] For Penner, property and contract are *intrinsically dissimilar* because they protect different interests. The interest that underpins property is the interest we have in *using* or dealing with things. Practically, this right to use can only be fully vindicated if it is accompanied by the right to *exclude* others from using the same. 'Use' and 'exclusion' are therefore two sides of the same coin: 'use serves a justificatory role for the right, while exclusion is seen as the formal essence of the right'.[24] Thus, 'the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things'.[25] Contracts, on the other hand, are concerned with forming cooperative relationships through bargains.[26] Unlike property, which relates to 'things',[27] a contractual right derives its content from its holder's personality.[28]

How, then, is a ‘thing’ to be identified? The key lies in the concept of ‘separability’. Something is separable, and capable of being the object of property if it is only contingently associated with the person who owns it. If I own a bicycle, the bicycle is only contingently mine because it is unnecessary for me to own one. It is the same bicycle even if it is owned by someone else. But one's talents, skill or labour, being inextricably bound to one's personality or identity, cannot be understood as ‘things’. Separability is not the same as transferability or alienability. It is the logically anterior concept: it is because something is separable and distinct from the person who holds it that it is regarded as transferable or alienable.[29] The test for separability, Penner suggests, is whether ‘a different person who takes on the relationship to the thing [would] stand in essentially the same position as the first person’.[30]

Built on the conventional paradigms of property (such as land) and non-property (such as a contract for service), Penner's analysis is, unsurprisingly, an adequate explanation of the difference between these phenomena. Much more subtlety is, however, required in explaining the ‘hybrid’ forms of property such as choses in action. Penner conceives of choses in action such as shares, bank balances and debts as holdings in respect of a piece of the total worth of a company, money in the bank or the debtor's total wealth. Distinguishing between the right (or holding) and its *value*, Penner argues that the personality of the one against whom the right is held is only relevant to the value—that is, in determining the worth of the right or holding—but not the right itself. This allows ‘the right itself to appear as if it reaches right through the debtor or the bank or the company to the property it legally holds’.[31] So stripped of its personality, the right is separable as a ‘thing’. In this way, a chose in action can be regarded as property by reason of its ‘relative “personality poverty” in relation to other rights *in personam*’.[32] But in attempting to reify choses in action, Penner ultimately disproves the very distinction he had painstakingly constructed. If the chose in action is a right to a portion of the counterparty's worth (or wealth, or wherewithal), and such worth is intimately bound up with the party's personality, then the personality *does* define the right. A share in a company that is a going concern is not merely a claim on the residual assets after the discharge of its liabilities to creditors. It is also a claim on the company that derives its personality from, amongst others, its management, track record, goodwill, prospects and the nature of its business. Further, a share entitles its holder to participate in the company's affairs and protection under relevant statutory provisions. Far from being severed from the company's personality, the entire relationship is suffused with the company's personality. By the same token, even a simple debt relation is not devoid of personality. Accepting that a debt relationship is centrally concerned with the exchange of economic value, such value can only be determined by reference to the *identity* of the debtor. The state of the debtor's wherewithal necessarily encapsulates her identity—her effort, capabilities and resources. To insist that such relationship is impersonal seems, at best, contrived.

Penner's analysis is provocative as a comprehensive and sustained effort to defend property as a distinct legal norm. However, while impersonality may indeed characterize many forms of traditional property, it is a much less cogent feature of property rights in the marginal cases. It is doubtful, therefore, if the criterion of impersonality is in fact useful in characterizing novel rights arising from industrial and financial innovation. Ironically, by attempting to redeem property, Penner may have affirmed what he has set out to disavow—Hohfeld's conception of *in rem* and *in personam* rights as qualitatively indistinct. Property rules are essentially rights to persons (and not things) for the simple reason that legal rules are ultimately concerned with the behaviour of persons.[33]

Hohfeld's depiction of *in rem* or property rights is initially disconcerting because it defies the common understanding of property as a ‘thing’, ie a concept capable of precise definition by reference to some inherent and unique quality. But that is precisely why it is significant. By exposing the fallacy in the conception of property as a reified object, Hohfeld's analysis suggests, instead, that the distinguishing criteria between *in rem* and *in personam* rights are *external* rather than internal to the right.[34] Fundamentally, property rules are the result of a legal culture's commitment to the protection of wealth and resources.[35] As such, property is an ‘essentially-contested concept’,[36] moulded in accordance with the social norms and ideology of a particular society. The designation of a resource as ‘property’ is therefore a *conclusion*, not a justification, derived from the application of particular normative or policy considerations.[37] Quite often, however, such normative decisions are masked in the language of

property. So, in *Boardman v Phipps*,[38] for example, it was held that a trustee may not exploit to his own advantage confidential information learnt in the course of administering a trust because such information constitutes 'trust property'. Likewise, in *Lipkin Gorman v Karpnale Ltd*,[39] a bank deposit being a chose in action was held to be a 'species of property' which, when stolen, entitled the owner thereof to trace (at common law) into the products obtained by the use of the stolen money.[40] And in *Attorney General for Hong Kong v Reid*,[41] an employee who had accepted a bribe was found to have held the same on constructive trust for his employer because the bribe was deemed, in equity, to be the 'property' of the latter.[42] In all these instances, property notions were injected to supply the normative force that was otherwise unarticulated.[43] Such normative force rests, in turn, on the conventional but misconceived understanding of property as an apolitical, pre-existing and inviolable right.[44] This form of reasoning reinforces the fiction that the role of the courts is confined to that of 'discovering' property. In reality, of course, a court *creates* property each time it accords 'proprietary' protection to a resource.[45]

Once it is recognized that property is a social construct rather than a transcendental phenomenon, it must become apparent that the concept is limited in both its content as well as analytical value. Ultimately, the decision to confer proprietary protection on a particular resource or interest calls for a thorough and explicit examination of the *nature* of the interest as well as the relevant *policy* considerations. By itself, property talk is neither a sufficient nor a useful substitute. But that is not to say that property is completely devoid of content. As a legal phenomenon, property has and will continue to be of critical importance in the realm of private law in denoting a sphere of individual liberty within which a legal person's access to resources is protected against the claims of the state and of other citizens.[46] When a property analogy is invoked, it is an attempt to adjust the boundaries of this sphere. While there exists no precise criterion for deciding where the boundary line ought to fall, the process is nevertheless constrained by broad and threshold conditions elucidated by the particular technique by which property secures liberty. Gray locates these 'irreducible elements' in the concept 'excludability'.[47] 'A resource is "excludable" only if it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource.'[48] It is not excludable if it is *physically* impossible to control access to the resource,[49] or if there exist *legal*[50] or *moral*[51] reasons that inhibit such control. Property, according to Gray, is thus essentially concerned with *control over access*:

Property is a power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources. If, in respect of a given claimant and a given resource, the exercise of such regulatory control is physically impracticable or legally abortive or morally or socially undesirable, we say that such a claimant can assert no "property" in that resource and for that matter can lose no "property".[52]

That being the case, the value of property analogies lies in directing the court's attention to the nature and degree of control which a claimant seeks to assert over a particular interest or resource, as well as the practical, legal and moral justifications for the same.

Given this broad and fluid conception of property, the apprehension of contract and property as conceptual opposites is plainly indefensible. Like property, contract does in some circumstances vest a measure of exclusive control in its holder. To that extent contractual rights may quite appropriately be described as 'property'. And it is in that vein that the references to property were made in *OBG v Allan*. Unfortunately, however, the use of property analogies without overt recognition of the normative forces at work tends to obfuscate rather than illuminate. Moreover, such analogies are commonly underpinned by the misconception of property as an integral concept, as a result of which a conclusion as to the 'propertiness' of a resource in one context is taken to imply general exclusivity in all other contexts. The facts and reasoning in *OBG v Allan* are particularly germane for exploring these difficulties.

3. Inducing Breach of Contract

Although the tort in *Lumley v Gye* has stood for well over a century, its precise rationale remains obscure.[53] In *OBG v Allan*, the House of Lords offered at least two justifications for the tort. First, that protection against strangers is warranted because contracts are a species of property.[54] Secondly, a person is liable for inducing another's breach of contract because by such inducement, the inducer has *joined in* the contract breaker's act. For this reason, the tort is a form of accessory liability; for '[if] there is no primary liability, there can be no accessory liability.'[55] Liability is thus founded on the proof of an actionable wrong, ie a breach of contract.[56] This basis of liability was also likened to that of *joint tortfeasance*[57] because a defendant would only be liable if he has actively participated in the primary wrongdoing. Mere facilitation is insufficient.[58]

Although this article is primarily concerned with the former justification, it is necessary briefly to evaluate the latter so as to discern the true rationale of the tort.

A. Joint and Accessory Liability

In *OBG v Allan*, one of their Lordships' chief concerns was to distinguish the tort of inducing breach of contract from unlawful interference with trade so as to avert the expansion of either tort in a way that would unduly impinge on the ordinary conduct of commercial life. To this end, the insistence on there being a *breach* of contract, some active participation on the part of the tortfeasor and a restrictive definition of the requisite state of mind were identified to limit the ambit of the inducement tort. These effectively put to an end any attempt to extend *Lumley v Gye* to interferences that merely prevent or hinder another from performing his contract without occasioning any breach of contract.[59] Insisting on a stricter causal nexus (ie the inducer's active participation) exposes the fallacy in the distinction between 'direct' and 'indirect' interferences,[60] and redirects attention to the more pertinent distinction between the inducement and unlawful interference tort. In addition, liability for the tort is predicated on the inducer's state of mind. The inducer must have known that his conduct would result in the contracting party's breach, in the sense that the breach is either an end in itself or a means to a desired end. That a breach is foreseeable would not suffice.[61]

That inducing breach of contract could be understood as a form of joint tortfeasance is supported by a line of authoritative decisions.[62] On closer analysis, however, the attempt to weave a common thread through joint torts and inducing breach of contract produces an oddity. When two or more persons are jointly liable in tort, only *one* tort is committed.[63] Similarly, if one party procures another to commit a tort, such as trespass, the latter's act is attributed to the former and both are the principal wrongdoers of the *same* tort. The act of procurement is not a separate tort.[64] Since joint tortfeasors are really liable as principals rather than accessories, joint tort liability is not, strictly speaking, a true form of accessory or secondary liability.[65] Applying this understanding of joint liability to the tort of inducing breach of contract, the conceptual incongruence becomes apparent.[66] Since a contractual obligation is unique to a contracting party, it cannot be breached by a non-contracting party. A 'joint principal' of another's contractual breach is manifestly a conceptual impossibility.[67]

It is possible, of course, that their Lordships in *OBG* did not intend a strict analogy between joint tortfeasance and inducing breach of contract, so that both torts though not identical are nevertheless understood as particular instances of the broader principle that one who procures another to commit a civil wrong is liable for that wrong. Support for this approach is found in the work of Philip Sales,[68] who argues that a number of areas in English civil law impose secondary liability on defendants on the premise of this general principle. Secondary liability of this order arises by analogy with criminal accessory liability and comprises two main principles.[69] The first is that a person is liable if he induces or procures another to commit a civil wrong. The second imposes liability on those who assist in the commission of a civil wrong.[70]

Sales may broadly be understood as saying that there exists a cluster of instances which are unified by the fact that they impose liability on a person who is in some way involved in another's wrong. But any attempt to extrapolate specific guidance from this broad observation proves to be unprofitable.[71] For a start, the analogy with secondary liability for crime has been rejected as unhelpful because criminal law has historically developed to address different policy concerns.[72] A person may be criminally guilty of inciting another to commit a crime even if no crime is ultimately committed, but no equivalent of such inchoate offences exists in civil law. And while criminal law sanctions the aiding and abetting of a crime, the mere assistance or facilitation of another's tort is not a sufficient cause for imposing secondary liability for the tort.[73] In the context of equity, even though analogies have been drawn between inducing breach of contract and knowing assistance with a breach of trust,[74] any suggestion to homogenize their constituent elements has not been seriously pursued. On the contrary, these causes of action continue to develop apart. Thus, a person who has assisted with a breach of trust is only liable if he is aware that his conduct is dishonest by the standards of reasonable and honest people,[75] but neither assistance nor subjective dishonesty is a constituent of joint tortfeasance or procuring contractual breach. More controversially, the House of Lords has recently rejected the popular view that conspiracy by unlawful means is a form of secondary liability, holding that the gist of the tort lies in the fact of combination rather than actionable wrongdoing.[76] This development usefully cautions against too zealous an attempt to unify disparate strands of private law. Ultimately, each rule can only be convincingly rationalized by reference to the distinct policy concerns underpinning the same.

To summarize, inducing breach of contract cannot be analysed as a form of joint liability because a breach of contract cannot, by its intrinsic nature, be committed by a non-contracting party. It may loosely be described as a form of secondary or accessory liability since there exists a nexus between the act of persuasion and the contractual breach, but this descriptor by itself neither justifies nor elucidates the tort. Because the tort is essentially concerned with protecting contractual interests, or a particular aspect of such interests, its rationale can ultimately only be uncovered by examining the nature of this protected interest.

B. Contract as Promise

In an illuminating and persuasive account,[77] Andrew Simester and Winnie Chan argued that the contractual *promise* is at the heart of the inducement tort. In their reasoning, Simester and Chan relied on Joseph Raz's conception of promise-making as an act that creates an obligation of intrinsic worth.[78] In Raz's analysis, contractual promises are enforceable because the practice of promising creates a ‘special bond’ between the promisor and the promisee that is regarded as valuable. Such a bond obliges the former to regard the claim of the latter as one having a ‘peremptory force’, ie that the promisor must disregard reasons that may conflict with his promise to perform.[79] That means, in the words of Simester and Chan, that the promise ‘*creates* a reason that did not previously exist, obliging the promisor to treat the promisee as special.’[80] A valid contract thus produces two distinct legal and moral entitlements: ‘the right to pre-emptive status in the promisor's reasoning, and the right to performance’.[81]

Differentiating these two entitlements is critical to Simester and Chan's thesis because it helps to explain the distinct conceptual bases of the inducement tort and the unlawful means tort. A third party who persuades a promisor not to perform his contractual undertaking undermines ‘the very status of that undertaking as a reason-generating promise’.[82] The wrong lies in attacking the peremptory nature of the promisor's promise. In contrast, a party's promise is not similarly affected in the paradigm case of unlawful interference, where the third party prevents performance by the use of unlawful force. In this context, the third party's conduct is not aimed at subverting the promisor's promise but to inflict harm on the promisee generally. Liability is thus founded on the third party's intention to harm the promisee through the use of unlawful means.

By teasing apart the distinct interests generated by a contractual promise, Simester and Chan's analysis departs from traditional justifications that assume the protected interest is a monolithic concept of contracted performance or benefit. The latter generally leads to an expansive view of the tort. If the tort

is understood as protecting performance generally, then it will apply whenever a third party had by intentional conduct harmed the promised performance, rendering irrelevant the precise mode by which harm is inflicted. In contrast, Simester and Chan's analysis produces a better fit with the inducement tort as delineated by the House of Lords in *OBG v Allan*. It explains, in particular, why direct inducement or persuasion is an essential element of the tort. Because the tort seeks to uphold the peremptory status of the promise, liability is only triggered if the third party's conduct is aimed at perverting the promisor's attitude towards his own promise, ie in ceasing to regard the same as bearing peremptory status.

C. 'Property' in Promises

If Simester and Chan are right, then the specific interest that the inducement tort protects is that of the promisee's superior access to the promisor's promise. The peremptory nature of the promise provides both legal and moral grounds for excluding the third party's interference. Given this exclusive access (vis-à-vis third parties) to the peremptory status of the promisor's promise, can the promisee's interest not be characterized as a form of 'property'? Such a proposition may appear, at first sight, ludicrous. To recall, it has been observed that it is an irreducible feature of a proprietary resource that it must be 'excludable', ie it must be feasible to regulate the access of strangers to the benefit inherent in such resource.[83] To say that a promisee has 'property' in the peremptory nature of the promise will thus suggest that the promisee is able to restrict another's access to that aspect of the promise which, in essence, relates to the promisor's *state of mind*. Seen in this light, the proposition is both physically impossible and morally objectionable. As Simester and Chan observed in a related context,[84]

When it comes to other persons' attitudes, emotions, intentions, and the like, ownership analogies are entirely misplaced; indeed, they are inconsistent with the principles of individual autonomy that are the cornerstones of any liberal society.

But this is not an irrefutable objection. Its essential supposition is that notions such as 'property' and 'ownership' imply *absolute* control and thus the assertion of such control over a person's reasoning process is both senseless and repugnant. That is, as we have seen,[85] a misconception because property and ownership are relative rather than absolute concepts, and thus the ability to exclude access is itself a relative rather than an absolute phenomenon. It is true, of course, that a promisee can in no way prohibit a promisor from *contemplating* a contractual breach.[86] But the inducement tort allows her to seek an injunction and/or damages on proof of a causal link between the breach of the contract and the third party's active inducement or persuasion. To that extent, the promisee is able to restrict, *vis-à-vis third parties*, access to the peremptory status of the promise and, to that extent, the law recognizes that her interest is an 'excludable' resource.

So defined, this property interest is really rather limited. As a relative concept, it does not claim that a contractual right is a 'thing' that is a superior entitlement in all contexts. Thus, the fact that contracts are protected from a third party's inducement may not by itself warrant the application of other 'proprietary' consequences, such as the availability of injunctive remedies upon breach, or the conferral of priority in insolvency. In each context, the nature of the protected interest and its 'excludability' has to be examined afresh.

This approach may be contrasted with other attempts to justify the inducement tort by analogy, such as that made by Richard Epstein.[87] In his analysis, Epstein suggests that the *promised performance* could be regarded as property owned by the promisee, and a third party who has notice or knowledge of the anterior contract 'appropriates' this property from the promisee when he procures the promisor's breach. By analogizing closely with the tort of conversion, Epstein sees the gist of the tort as lying in the inducer's mere *receipt* of property.[88] Seen in this light, 'property' is a stable and absolute notion comprising the promised performance. But this account has the effect of dramatically enlarging the scope of the tort. If the tort is indeed concerned with protecting performance generally, then liability should attach whenever a third party's conduct has the effect of inhibiting performance. It will not be

necessary to establish inducement or even intention. A sufficient causal link between the third party's conduct and the fact of non-performance will suffice. This, however, is precisely the result that the House of Lords painstakingly sought to avoid in *OBG v Allan*. As it is presently circumscribed, the tort confers (vis-à-vis the third party) exclusivity on the interest in the promise, not the performance.

It is respectfully submitted, therefore, that Lord Hoffmann's depiction[89] of contracts as a species of property requiring special protection ought to be understood in its proper context. Such 'property' as exists should be confined to the status of the promise. Moreover, it should not be assumed that the same interest is at stake in other contexts. As we shall see, the tort of conversion—if it could apply to contract rights at all—is concerned with protecting an entirely different facet of contractual interests.

4. Conversion

Despite its antiquated origin, the tort of conversion is not easily understood and difficult to define because of the infinite varieties of circumstances in which it may occur.[90] Broadly, it is said to guard against the 'unauthorised dealing with the claimant's chattel so as to question or deny his title to it.'[91] Whilst the origin of the tort lies in the protection of personal property, its protection has since been extended to 'documentary intangibles'[92] such as cheques, negotiable instruments, shares, guarantees, insurance policies and bonds. Liability for conversion is, in general, strict. The defendant's ignorance of the claimant's rights is not usually a defence to a conversion claim. The rationale is that '[at] common law, one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them.'[93] Interestingly, although the extension of conversion liability to documentary intangibles has for some time been described as 'odd'[94] and fictional,[95] no serious attempt has been made to rationalize this phenomenon until *OBG v Allan*.

A. OBG v Allan

The claims in *OBG v Allan* arose in respect of the unauthorized dealings of the defendants, who were receivers appointed over the claimant's (a civil engineering company) business and assets. Acting in good faith, the defendants assumed control of the company, took steps to wind down its business, sold its land and other tangible assets, terminated its outstanding contracts with subcontractors, and negotiated a settlement with one of its largest customers in respect of outstanding claims. It turned out, however, that the defendants' appointment as receivers was in fact invalid. The claimant through its liquidator then brought proceedings against the receivers claiming, *inter alia*, that in acting without authority, the receivers had trespassed, converted and wrongfully interfered with its business, assets and undertakings. No one disputed that the receivers were liable for converting the claimant's tangible assets including plant, machinery and chattels, but the same could not be said of their unauthorized dealings with the claimant's debts and contracts. The submission that the tort of conversion applied to contract rights was rejected at trial, and subsequently by the Court of Appeal[96] as well as by a majority of the Law Lords. The resulting conundrum is plain. The receivers dealt unlawfully with both tangible and intangible assets, so why was liability confined to the former?

Most of the reasons are contained in the speech of Lord Hoffmann, with whom Lord Walker and Lord Brown concurred. The first is historical.[97] The tort originated as a means of protecting chattels and has largely continued to develop as such. Even when the Torts (Interference with Goods) Act 1977 was enacted, Parliament had not seen fit to alter this narrow object.[98] Secondly, the damages that OBG claimed to have arisen from the alleged conversion of its contracts were, in Lord Hoffmann's view, a form of pure economic loss. Extending the conversion tort—a form of *strict* liability—to protect such interests is thus inconsistent with English law's characteristically restrictive attitude towards the recovery of pure economic loss.[99] Thirdly, while it is well-established that liability may arise for conversion of documentary choses in action, the application of the tort to such instruments is better seen as an anomaly and is thus a weak base on which to expand the tort.[100] Alternatively, the divergent

treatment of documentary and general choses in action distinction may, as suggested by Lord Brown, be justified by the fact that the former has 'real and ascertainable value' but the latter does not.[101]

For the dissenting Law Lords (Lord Nicholls and Baroness Hale), however, the distinction between tangible (chattels) and intangible (contracts) rights is indefensible. Having recognized that a chose in action comprised in a document may be converted, English law must be taken to have accepted that both tangible and intangible rights may be misappropriated and merit equal protection.[102] No rational basis exists for distinguishing between contract rights embodied in a document and those that are not. In all cases, the underlying interest protected by the law is the *contractual* interest, and not the document.[103] Once contract rights are regarded as 'property', the law must logically supply 'proprietary' remedies to protect them.[104]

Embedded in their Lordships' reasoning are diverse conceptions of 'property'. The strict conception of property as a 'thing' is most conspicuous in Lord Hoffmann's speech. His Lordship's distinction between chattels and choses in action (which results only in 'pure economic loss') reflects the understanding of property as a 'thing', or more specifically, as *physical* things. In a similar vein, Lord Brown deplored the claimant's attempt to sever the link between the tort of conversion and 'the wrongful taking of *physical* possession of property.'[105]

Baroness Hale's reasoning hints, at first sight, at comprehending property as 'things' but, on closer inspection, more closely resembles Honoré's analysis of ownership as a manifestation of a group of legal incidents.[106] Noting that the 'property' to which conversion applies has evolved over time, her Ladyship observed that 'the essential feature of property is that it has *an existence independent of a particular person*: it can be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts, acquired (in the olden days) by a husband on marrying its owner.'[107] In a later passage,[108] her Ladyship distinguished between choses in action that are 'of a purely personal kind' and those that enjoy 'the characteristics of property', contending that the latter group of rights ought, whether or not embodied in a document, to be regarded as capable of being converted. Taken together, her Ladyship appears to suggest that property, in the nature of an impersonal right, may be identified by reference to 'standard' features such as transferability and transmissibility. While this conception does broadly reflect the conventional understanding of property,[109] the suggestion that property may be identified by particular definitive traits such as assignability is, with respect, unlikely to be helpful. As Gray has observed,[110] a right is not property because it is assignable. Rather, it is assignable only because it *is* property. In other words, the law confers property status when it permits the transfer of a right or interest. Overall, Baroness Hale appears to advocate a fairly broad approach to 'property'. In *OBG v Allan*, the allegedly converted contracts were engineering contracts that involved the provision of services the value of which could not be precisely ascertained. Nevertheless, her Ladyship was prepared to hold that such contracts could be converted. This would suggest that most commercial contracts could properly be regarded as a *species* of 'impersonal' rights.

Since conversion is concerned with the protection of property, focusing on 'property' is clearly right. But 'property' cannot be understood *in vacuo*. As with inducing breach of contract, property talk is only meaningful if it is recognized that the term is itself a relative concept that derives its content from its context. To different degrees, both the majority and dissenting Law Lords appear to have assumed that property is either an absolute concept, or a concept with distinct features. As explained, such assumptions have a tendency to obscure more cogent analyses. In the final analysis, the parameters of the tort can only be determined by analysing the nature of the legal interests which it aims to protect.

B. Protection of Ownership and Control

At law, the tort of conversion is said to protect a person's *possessory interests* in chattels. The right to bring an action for conversion is not confined to the true owner of a chattel, but extends to any person who has possession, or an immediate right of possession to the same. Legal possession is established if a person has physical custody and control of property ('factual possession') and the intention to exercise

such custody and control for his own benefit ('intention to possess').[111] The reason for according possession special protection is that a person who has possession of a chattel is presumed, as against the wrongdoer, to have *ownership* of the chattel because 'possession in fact is the visible exercise of ownership, the fact of possession, so long as it is not otherwise explained, tends to show that the possessor is the owner'.[112] Possession is thus a term of art, a legal conclusion drawn in respect of the *observable* exercise of control over a *physical* matter. By the same token, the possession of an intangible is generally thought to be impossible.[113] The majority Law Lords' narrow conception of 'property' in *OBG v Allan* affirms this traditional position.

But in keeping faith with precedent, the majority's conclusion accentuates a growing gap in the protection of valuable personal resources. By confining the tort of conversion to tangible property, it leaves unaddressed the vulnerability of intangible rights which, as the decision in *OBG v Allan* amply demonstrates, are also susceptible to usurpation by unauthorized persons. The suggestion to extend the tort of conversion to safeguard such interests is therefore not wholly without merit. Fundamentally, the tort may be understood as an instantiation of the broader principle of protecting a person's *ownership*, or (on Gray's analysis[114]) control of access to a valued resource. In the past, the contours of the tort have been demarcated by reference to the characteristics of tangible property because such were the valuables of those times. In that context, possession has acquired a high degree of protection because physical control of tangible property was the best proxy of ownership or exclusive control. But, as social perceptions of value evolve, so should the law. If it is accepted that the gist of the tort lies in protecting exclusive control over the use of valuable resources generally, the precise manifestation of control must surely be context-dependent. There is, in principle, no reason for insisting on physical control when the relevant resource does not exist in physical form.[115]

In determining whether a particular resource may be protected by the tort of conversion, the starting point is to examine whether the protected interest is, by its nature, one that is 'excludable'.[116] Applied to contractual rights, the analysis is surprisingly straightforward. Except where the same has been delegated or assigned, a contracting party's rights to deal with the contract are, by definition, exclusive to him. Of course, there are instances where the precise form of control has been modified by law and practice. Documentary intangibles, for example, may vest control in the holder of the relevant document or instrument representing the chose in action, but that does not alter the fact that the underlying chose in action is intrinsically amenable to exclusive dominion.[117] On the facts of *OBG v Allan*, for instance, it cannot be doubted that the claimant ought, in the absence of any unauthorized interference, to have the sole and exclusive right to determine the conduct and discharge of its contracts. Thus on both factual and moral grounds, there appears to be no reason why a party's dominion over his contract rights ought not to be shielded against the obtrusion of strangers. Put another way, there is prima facie no reason why contract rights could not constitute convertible 'property'.

C. Control Distinguished from Benefit

Expanding the tort to protect intangibles would, as the majority Law Lords observed in *OBG v Allan*,[118] necessitate the re-conception of its elements. It would require all ideas premised on the physical world—such as possession and the detailed rules on the acts that constitute conversion[119]—to be re-examined and possibly reconstructed in their application to intangibles. Lord Walker denounced this as 'too drastic' a change.[120] Evidently, such concern as regards the breadth of the suggested reform is not confined to the internal reworking of the tort, but extends also to the complexities involved in rationalizing the expanded tort within the general structure of civil liability. Under the general structure, tort law accords different degrees of protection to property and other economic interests. Liability for violating property rights is generally strict, but liability for pure economic loss is fault-based. Having characterized the alleged conversion of the claimant's debts and contracts as a claim for pure economic loss, imposing liability on the basis of a 'property' framework seemed—to the majority Law Lords—wholly incongruous. For this reason, Lord Hoffmann warned against 'making fundamental changes to the law of tort in order to provide remedies which, if they are to exist at all, are properly the function of other parts of the law'.[121]

The foregoing analysis is, however, premised on the assumption that the contractual interest—as a form of pure financial interest—is reducible to a singular construct comprising essentially the *benefit* of the contract. With respect, such an approach is erroneous in conflating the distinct contractual interests that a party acquires. In *OBG v Allan*, the claimants did not merely allege that the receivers had caused them loss. The essence of their complaint was that the receivers had wrongly usurped their rightful *control* over the legal rights attached to the relevant debts and contracts. No doubt the claim crystallizes in financial damage, but such damage is the result, not the cause, of the alleged violation. This distinction between the rights to manage or control one's contractual interests, and the benefit or enjoyment of such interests, is palpable. Once a binding contract is formed, the contracting party acquires the power to decide what to do with his rights under the contract. He may choose to perform his obligations or otherwise discharge or terminate the contract in a manner permitted by the law. The nature of the power is certain and exclusive to the contracting party once it is vested in him. The contracted benefit, in contrast, is contingent and uncertain. Although a contracting party has an expectation to receive such a benefit, he does not 'own' the same until and unless it crystallizes upon performance. Apart from the counter-party's performance, other external factors may also affect its value. On that account, exclusive access to the contracted benefit is conceptually impossible.

Once the element of control is isolated as the gist of the tort, its expansion to protect contractual rights would in practice represent only 'a modest but principled extension'.[122] Liability is not triggered by conduct that affects the value of the contract. Instead, it arises only in situations where control over contractual rights has been *directly* and invalidly assumed or misappropriated by the converter. Such situations would be rare, because contractual choses in action are, by their very nature, rarely amenable to such interference. Ordinarily, a third party cannot (except through the operation of law or the practice of deceit) acquire control over a contractual chose in action without the cooperation or assent of the contracting party. In the majority of cases, therefore, a claim for conversion would be met by the defences of acquiescence or estoppel.[123] A case such as *OBG v Allan* is thus more likely than not the exception.

The exercise of prudence in evaluating any proposed expansion of tortious liability is undoubtedly necessary and salutary. On the other hand, restrictions of liability have to be explicable on a principled and rational basis. As the facts of *OBG v Allan* amply demonstrate, the rapidly changing forms of valuable resources have placed the traditional distinction between tangibles and intangibles under severe strain. As the dissenting Law Lords observed,[124] there is no convincing reason for imposing strict liability on the receivers in *OBG v Allan* for the loss incurred in respect of the tangible assets but not the intangible assets. This same awkwardness may be observed of other forms of interests. It is well-established, for instance, that a share that is evidenced by a share certificate may be converted as the share is said to have merged with the certificate. However, shares that are actively traded in most modern economies have ceased, for most practical purposes of the ordinary shareholder, to be represented by any physical document. Instead, these shares are dematerialized, and the interest of the shareholder is reduced to that of a contractual chose in action.[125] Following the decision of the House of Lords in *OBG v Allan*, a third party would be liable for unauthorized dealing with shares represented by share certificates, but not if he had similarly dealt with shares listed on an exchange. This would be a surprising result, creating, as it were, two distinct legal regimes in respect of what is essentially the same subject matter.

It is true, of course, that the tort of conversion may not always be the most appropriate means of protecting one's exclusive access to a particular resource.[126] The applicability of the tort to novel resources would have to be scrutinized in context. In *OBG v Allan*, Lord Hoffmann was evidently troubled by the prospect of enlarging the exposure of honest receivers to strict liability.[127] But what this calls for is a re-examination, which only Parliament may do, of the propriety of subjecting honest receivers to strict liability generally. It is one thing to say that receivers should not be strictly liable for honest but mistaken conduct, quite another to say that there can be no liability at all for converting another's intangible assets.

5. Conclusion

An article of this brevity cannot pretend to resolve many or even some of the intractable difficulties arising at the intersection of tort, contract and property. However, it does hope, if only wishfully, that the reader will be persuaded of at least two observations. First, in the troubled borderland of contract and tort, 'property' is an attractive and promising answer from a distance but its appeal fades as soon as it approaches. A satisfactory resolution resides, ultimately, in a thorough examination of the interest that is sought to be protected as 'property'. Secondly, the common assumption that contractual rights are in all circumstances reducible to a singular interest in the promised benefit or exchange value is misconceived. It may be that, as between contracting parties, the promised performance or the benefit thereof is of utmost importance. Beyond that, however, the rights of a contracting party vis-à-vis third parties may warrant a different perspective.

Endnotes

[1] [2008] 1 AC 1.

[2] See G Chan, 'Of Unities and Disunities in Economic Torts: *OBG*, *Douglas* and *Mainstream*' (2008) 19 KLJ 158–68; J O'Sullivan, 'Intentional Economic Torts in the House of Lords' [2007] CLJ 503–7.

[3] A third tortious dimension relates (perhaps more obliquely) to the need for a broader and freestanding tort of privacy, but which appears to have been curtailed by the extension of the breach of confidence action. The focus of the present article is, however, on the torts directly concerning contracts.

[4] *OBG v Allan* (n 1) [32] (emphasis added).

[5] (1853) 2 E and B 216.

[6] *OBG v Allan* (n 1) [99].

[7] Ibid [310].

[8] K Gray, 'Property in Thin Air' (1991) 50 CLJ 252, 296.

[9] To borrow Prof. Kevin Gray's expression: ibid 266.

[10] WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning II' in W Cook (ed), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale UP, New Haven 1919) 72.

[11] Ibid 77.

[12] Ibid 76.

[13] Ibid 85–91.

[14] See eg R Bagshaw, 'Inducing Breach of Contract' in J Horder (ed), *Oxford Essays in Jurisprudence* (Fourth Series OUP, Oxford 2000) 131, and R Epstein, 'Inducement of Breach of Contract as a Problem of Ostensible Ownership' (1987) 16 JLS 1–41.

[15] J Penner, 'The "Bundle of Rights" Picture of Property' (1995) UCLA L Rev 711, 712; and T Merrill and H Smith, 'The Property/Contract Interface' (2001) 101 Colum L Rev 773, 782 – 3.

[16] See Hohfeld (n 10) 96.

[17] See eg T Grey, 'The Disintegration of Property' in Nomos XXII 69 (1980); re-published in R Epstein (ed), *Modern Understandings of Liberty and Property* (Garland Publishing Inc, New York 2000) 291, 293–5.

[18] See J Harris, *Property and Justice* (Clarendon Press, Oxford 1996) 119–61. See also S Worthington, 'The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Thomson Lawbook Co., Sydney 2005).

[19] AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP, Oxford 1961) 107–47, 113. Honoré, however, departs from Hohfeld's thesis in recognizing that ownership is not to be understood entirely as a bundle of *rights* but an owner also stands in a 'special relation' to his property by reason of the fact that he can exclude others from interfering with his rights over the property: ibid 128–34.

[20] Ibid 112.

[21] Ibid 132.

[22]*Chan Man-sin v The Queen* [1988] 1 WLR 196.

[23] J Penner, *The Idea of Property in Law* (OUP, Oxford 2000).

[24] Ibid 71. Penner elaborates on the right to exclusive use as comprising the right to license, give, leave by will and abandon property but oddly argues that ownership does not entail the right to sell or exchange property: ibid 91–2. The reason given by Penner—that a sale does not involve the use of the property but an extraction of value from the property—is clearly unconvincing for it has always been possible for property to be owned as 'thing' or as wealth or both: see B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 OJLS 81–97. In maintaining this view, Penner may have been anxious to avoid the syllogism that because property ownership entails the right of sale (and contracts effect sales), all matters subject to contracts are therefore 'property'. It may be true indeed that contracts do not always involve property, and the concept of contract does not depend on property. However, where the subject matter of a sale *is* property, the sale is surely possible only because (generally speaking) the seller first owned the property. It is awkward, to say the least, to insist that the owner is not in such an instance exercising an incident of ownership.

[25] Ibid 71.

[26] Ibid 51 and 92.

[27] Ibid 26.

[28] Ibid 29.

[29] Ibid 113.

[30] Ibid 114.

[31] Ibid 130.

[32] Ibid 131.

[33] See P Eleftheriadis, 'The Analysis of Property Rights' (1996) 16 OJLS 31, 39 and the literature cited therein.

[34] Ibid 46.

[35] Ibid 53.

[36] J Waldron, *The Right to Private Property* (Clarendon Press, Oxford 1998) 31.

[37] See C Rotherham, 'Property and Justice' in M Kramer (ed), *Rights, Wrongs and Responsibilities* (Palgrave, New York 2001) 148, 152.

[38] [1967] 2 AC 46, 107 (Lord Hodson) and 115 (Lord Guest), discussed by Rotherham (n 37) 153. On the analytical value of conceptualizing information as property, see the excellent and thorough discussion by P Kohler and N Palmer, 'Information as Property' in N Palmer and E McKendrick (eds), *Interest in Goods* (2nd edn LLP Limited, London 1998) ch 1.

[39] [1991] AC 548.

[40] Ibid 573–4 (Lord Goff).

[41] [1994] 1 AC 324.

[42] Ibid 331 (Lord Templeman); cited by Rotherham as a classic instance in which property was ritually applied to suppress or replace cogent policy considerations (such as the rights of third party creditors in the event of insolvency): see C Rotherham, 'Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies' [2000] 1 Theo Inq L 205, 210; and by the same author, 'Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk' (1996) 16 UNSWLJ 378, 390–7.

[43] See G Samuel, 'Property Notions in the Law of Obligations' (1994) 53 CLJ 524, 533.

[44] Rotherham (n 37) 159–62.

[45] F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columb L Rev 809, 816.

[46] Rotherham (n 37) 163.

[47] Gray (n 8) 295.

[48] Ibid 268.

[49] Gray cites as an illustration of such non-excludable resource the light emitted by a lighthouse: ibid 269.

[50] For example, access to a resource may be defined by binding contractual provisions, or the rules of a legal regime such as those governing intellectual property rights: ibid 273–80.

[51] Here, Gray clarifies that the reference is to *public* morality, ie 'social conventions or *mores* which promote interactive social existence': ibid 280.

[52] Ibid 294.

[53] And the defensibility of the tort is still being questioned: see D Howarth, 'Against *Lumley v Gye*' (2005) 68 MLR 195–232.

[54] See n 4, above.

[55]*OBG v Allan* (n 1) [5], [8] and [172].

[56] Ibid [5].

[57] Ibid [36]; forcefully advocated by H Carty, *An Analysis of the Economic Torts* (OUP, Oxford 2001) 70–2.

[58]*CBS Songs v Amstrad Consumer Electronics plc* [1988] AC 1013, 1058. See also H Carty 'Joint Tortfeasance and Assistance Liability' (1999) 19 Legal Stud 489–514.

[59]*OBG v Allan* (n 1) [44] and [185], disagreeing with Lord Denning in *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, 138 and Lord Diplock in *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, 608.

[60] Drawn in *DC Thomson & Co Ltd v Deakin* [1952] Ch 646; and *Torquay Hotel Co Ltd v Cousins* (n 59).

[61]*OBG v Allan* (n 1) [43], overruling *Millar v Bassey* [1994] EMLR 44.

[62] See *Lumley v Gye* (n 5) 232 (Erle J), *CBS Songs Ltd v Amstrad Plc* [1988] 1 AC 1013.

[63]*The Koursk* [1924] P 140 (CA) 155.

[64]*Credit Lyonnais NV v ECGD* [1999] 2 WLR 540, 549.

[65] See R Stevens, *Torts and Rights* (OUP, Oxford 2007) 256–7.

[66] Ibid 275–8.

[67] A point made by Coleridge J in his dissent in *Lumley v Gye* (n 5) 249.

[68] P Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 CLJ 491–514.

[69] Ibid 503.

[70] This second limb has been criticized as being too broad: see Carty (n 58) 505–13.

[71]*Credit Lyonnais NV v ECGD* (n 64) 551.

[72] An excellent exposition of the differences between the two regimes is found in the judgment of Hobhouse LJ in the Court of Appeal's decision in *Credit Lyonnais v ECGD* [1998] Lloyd's LR 19, 42–6. See also Carty (n 58) 503–4; and Stevens (n 65) 256–7.

[73]*CBS Songs v Amstrad Consumer Electronics plc* (n 58).

[74] See *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1998] 2 AC 378, 387 (Lord Nicholls) and *Twinsectra Ltd v Yardley* [2002] 2 AC 164, [127]–[132] (Lord Millett, dissenting).

[75]*Twinsectra Ltd v Yardley*, ibid.

[76]*Total Network SL v Her Majesty's Revenue and Customs* [2008] UKHL 19, [2008] 1 AC 1174.

[77] A Simester and W Chan, 'Inducing Breach of Contract: One Tort or Two?' (2004) 63 CLJ 132–65.

[78] Ibid 151. See also J Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 (Supp) *Proc Aristotelian* Soc 79. Raz's approach is not, however, free from difficulty: see M Pratt, 'Promises, Contracts and Voluntary Obligations' (2007) 26 Law Phil 531, 560–72, doubting whether the promise-keeping rule could be grounded on the special bonds created by promises.

[79] Simester and Chan (n 77) 151 citing from J Raz, 'Promises and Obligations' in P Hacker and J Raz (eds) *Law, Morality and Society* (OUP, Oxford 1977) 228.

[80] Simester and Chan (n 77) 151 (emphasis in original).

[81] Ibid. Because the promisee's entitlement to the promisor's peremptory reasoning is distinct from the entitlement to performance, Simester and Chan further contend (ibid 152) that a promisor may wrong a promisee even if she chooses, independently of any third party inducement, to disregard the peremptory force of her promise. But this wrong does not, in the present writer's view, precipitate a loss that is distinct from that arising from the breach of contract.

[82] Ibid 152.

[83] See nn 47–52, above.

[84] Simester and Chan (n 77) 149.

[85] See nn 34–52, above.

[86] For this reason, the promisee's entitlement to the peremptory status of the promise cannot, *as against the promisor*, properly be described as 'proprietary'.

[87] See eg Epstein (n 14).

[88] This produces a poor fit with the stricter requirement for active participation as clarified by the House of Lords in *OBG v Allan:* see nn 59–60, above. Also, to describe the inducer as 'taking' or 'misappropriating' property (the promised performance) from the promisee appears odd because liability is not dependent on proof that the inducer has been enriched.

[89] See n 4, above.

[90]*See Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883, 1084. See also W Prosser, 'The Nature of Conversion' (1957) 42 Cornell LQ 168–84.

[91] A Dugdale and M Jones (eds), *Clerk & Lindsell on Torts* (19th edn Sweet & Maxwell, London 2006) [17-06].

[92] Defined by Michael Bridge as 'instruments and documents that are so much identified with the obligation embodied in them that the appropriate way to perform or transfer the obligation is through the medium of the document': see M Bridge, *Personal Property Law* (3rd edn OUP, Oxford 2002) 8.

[93]*Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956, 970–1 (Lord Diplock).

[94] Ibid 970.

[95] See *Smith v Lloyds TSB Group plc* [2001] QB 541, 551 and 557 (P ill LJ and Potter LJ), and *OBG Ltd v Allan* [2005] QB 762, [76] (Mance LJ), cited by Lord Nicholls in *OBG v Allan* (n 1) [227].

[96] [2005] 1 QB 762.

[97]*OBG v Allan* (n 1) [95]–[97].

[98] Ibid [100].

[99] Ibid [99].

[100] Ibid [103] and [106].

[101] Ibid [321] (Lord Brown).

[102] Ibid [230].

[103] Ibid [230] and [232].

[104] Ibid [310].

[105] Ibid [321].

[106] See nn 20 to 23, above.

[107]*OBG v Allan* (n 1) [309] (emphasis added).

[108] Ibid [310].

[109] See K Gray and S Gray, *Elements of Land Law* (5th edn OUP, Oxford 2009) [1.5.28].

[110] See Gray (n 8) 293.

[111]*J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 435.

[112] F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Clarendon Press, Oxford 1888) 25.

[113] See Bridge (n 91) 17. See also D Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330–65, 362.

[114] See nn 47–52, above.

[115] See S Green, 'To Have and to Hold? Conversion and Intangible Property' (2008) 71 MLR 114, 116. Apart from the Canadian decisions cited in Baroness Hale's judgment (see *OBG v Allan* (n 1) [316]), another (arguably more controversial) instance of an extension of conversion liability to intangibles (confidential information) is found in the Malaysian decision *Electro Cad Australia Pty Ltd v Mejati RCS Sdn Bhd* [1998] 3 MLJ 422, where it was said (at 451) that a broader view of property had to be taken in keeping with the rapid and volatile nature of technological advancements. I am indebted to my colleague George Wei for alerting me to this decision.

[116] See nn 47–52, above.

[117] See Green (n 115) 117.

[118]*OBG v Allan* (n 1) [271] and [322]. Similarly, Peter Gibson LJ in the Court of Appeal described the proposed extension as an 'invention' of a new tort: see *OBG v Allan* (n 95) [57].

[119] See A Tettenborn, 'Liability for Interfering with Intangibles: Invalidly-appointed Receivers, Conversion, and the Economic Torts' (2006) 122 LQR 31, 33.

[120]*OBG v Allan* (n 1) [271].

[121] Ibid [99].

[122] Ibid [233].

[123] As alluded to by Lord Nicholls, see ibid [240].

[124] Ibid [221] and [311].

[125] For an insightful account of the nature of dematerialized shares, see M Ooi, *Shares and Other Securities in the Conflict of Laws* (OUP, Oxford 2003) ch 6.

[126] See T Weir, *A Casebook on Tort* (10th edn Sweet & Maxwell, London 2004) 502.

[127]*OBG v Allan (*n 1) [107].

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